No. 97-531

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AVIATECA, S.A.,

Petitioner,

—v.—

RAUL PALACIOS ROMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Texas wrongful death statute provides that an action for the death or injury of a citizen of a foreign country that occurs outside Texas may be maintained in Texas *only* if the foreign country has "equal treaty rights" with the United States. This is an action seeking damages under the Texas statute for the deaths of five Nicaraguan citizens in an airplane crash in El Salvador.

Is there federal jurisdiction under 28 U.S.C. § 1331 because the existence of "equal treaty rights" between the United States and Nicaragua is:

1) an "essential element" of plaintiffs-respondents' well-pleaded state law claims; *and*

2) a "substantial" federal issue, which must be resolved each time an action is commenced in Texas to recover damages for the death or injury of a citizen of a foreign country that occurs outside Texas?

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court and to the proceedings below are:

1. RAUL PALACIOS ROMAN and CECILIA OTERO BRAVO, Individually and as Representatives of the Estate of ROGER RAUL PALACIOS OTERO, Deceased;

2. CAROLINA VARGAS DE TALAVERA, Individually and as Representative of the Estate of NELSON ENRIQUE TALAVERA MEJIA, Deceased, and as Next Friend of NELSON ENRIQUE TALAVERA VARGAS, a Minor;

3. MARIA CRISTINA MEJIA ROJAS;

4. ZETDA OFFIR FLORES RIVERS, Individually and as Representative of the Estate of EVARISTO DIONISIO GARCIA MONTANO, Deceased, and as Next Friend of EVA ALEJANDRA GARCIA FLORES, EDNA SUSANA GARCIA FLORES, JORGE EVARISTO GARCIA FLORES, MORA IGRAINE GARCIA FLORES, ZETDA LARAJILL GARCIA FLORES, Minors;

5. SUSANA MONTANO LEO;

6. REYNALDO HERIBERTO VALLE LOPEZ, Individually and as Representative of the Estate of HIPOLITA EUGENIA RAMIREZ VELASQUEZ, Deceased, and as Next Friend of KATHERINE YAOSA VALLE RAMIREZ, a Minor;

7. EUSEBIA RAMIREZ MANZANARES;

8. REYNALDO RAMIREZ BLANCO, Individually and as Representative of the Estate of DAMARYS SACASA DE RAMIREZ, Deceased, and as Next Friend of CHRISTIAN RAMIREZ SACASA and REYNALDO RAMIREZ SACASA, Minors;

9. EVANGELINA CRUZ;
10. ROGELIA URCYUO DE SACASA;
11. AVIATECA, S.A.

CORPORATE AFFILIATIONS

Petitioner Aviateca, S.A. has no parent companies or subsidiaries which are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner AVIATECA, S.A. ("AVIATECA") respectfully requests that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered June 27, 1997.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (App. 1a-9a) and the Southern District of Texas (App. 10a-13a) are not reported.[1]

[1] References to the Appendix are indicated as App. ___ a.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered June 27, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

This is a wrongful death action arising from the crash of a commercial airline flight operated by AVIATECA on August 9, 1995. AVIATECA Flight 901 originated in Miami, Florida and was scheduled to make stops in Guatemala, El Salvador and Nicaragua before terminating in Costa Rica. The aircraft encountered a thunderstorm during the flight segment from Guatemala to El Salvador and crashed into the Chichontepec volcano near San Salvador, El Salvador. All fifty-eight passengers and seven crew members died in the accident.

AVIATECA is a Guatemalan corporation with its principal place of business in Guatemala City, Guatemala. R 493, 492.[2] AVIATECA is engaged in the international transportation of passengers, baggage and cargo and operates flights to the United States pursuant to a foreign air carrier permit issued to it by the United States Department of Transportation. R 493, 492.

Plaintiffs-respondents are the alleged personal representatives and next of kin of five (5) passengers who died in the crash. R 27-23. The five passengers were citizens and residents of Nicaragua. R 27-25; 493, 491; 496-494.

B. Proceedings Below

The action was commenced against AVIATECA in the Texas state court (District Court of Harris County, Texas) on

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[2] References to the Record are indicated as R ___.

September 27, 1995. AVIATECA timely removed the action to federal court pursuant to 28 U.S.C. § 1331.

Respondents moved to remand and AVIATECA opposed the motion and also moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that respondents failed to state a claim under Tex. Civ. Prac & Rem. Code § 71.031. Because the decedents were citizens of Nicaragua and were killed in a plane crash in El Salvador, under the terms of the Texas statute respondents may maintain this action *only* if there are "equal treaty rights" between the United States and Nicaragua. AVIATECA asserted that respondents lacked standing because "equal treaty rights" do not exist between the United States and Nicaragua. AVIATECA also moved to dismiss on the ground of *forum non conveniens*.

The district court issued an Order and Final Order denying respondents' motion to remand and granting AVIATECA's motion to dismiss for failure to state a claim. App. 10a, 12a.

Respondents appealed and the Fifth Circuit Court of Appeals reversed and remanded the action to the state court in a *per curiam* opinion filed on June 27, 1997. App. 1a.

REASON FOR GRANTING THE WRIT

This case merits a straightforward application of the clear line of decisions of this Court holding that federal jurisdiction exists under 28 U.S.C. § 1331 where resolution of a substantial federal issue is an essential element of the plaintiff's state law cause of action[3]. Because the Texas wrongful death statute requires a plaintiff seeking damages for the death of a foreign citizen to establish that there are "equal treaty rights" between the country of the decedent's citizenship and the

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[3] *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

United States, resolution of this issue is an essential element of the cause of action. Moreover, by founding the cause of action on substantive rights conferred by treaties (and by failing to define which treaties or treaty provisions will satisfy the requirement), the Texas legislature has created a recurring, substantial federal issue which must be resolved each time a plaintiff invokes the statute for the death or injury of a foreign citizen. Certiorari should be granted to resolve whether federal jurisdiction exists so that a uniform standard of treaty interpretation and construction can be applied to eliminate conflicting and inconsistent decisions of the state and federal courts.

THE "EQUAL TREATY RIGHTS" REQUIREMENT OF THE TEXAS WRONGFUL DEATH STATUTE CREATES A SUBSTANTIAL QUESTION OF FEDERAL LAW, WHICH MUST BE RESOLVED EACH TIME AN ACTION IS MAINTAINED FOR THE DEATH OR INJURY OF A FOREIGN CITIZEN THAT OCCURS OUTSIDE TEXAS

This action was commenced under Section 71.031 of the Civil Practice and Remedies Code of the State of Texas. R 15, 13-12; 27, 22.

Section 71.031 provides in pertinent part:

> An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> * * *
>
> **(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.**

Tex. Civ. Prac. & Rem. Code § 71.031 (1997) (emphasis supplied)[4].

Because the decedents were citizens of Nicaragua, the respondents have standing to maintain this action *only* if Nicaragua "has equal treaty rights with the United States on behalf of its citizens." *Id.*

It is well established that:

> "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts: 'The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331. . . ."

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983).

Although the majority of actions that arise under federal law "are those in which federal law creates the cause of action", a case may also arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (*quoting Franchise Tax Board*, 463 U.S. at 9). Justice Frankfurter is often quoted for this rule:

> Although it has sometimes been suggested that the "cause of action" must derive from federal law . . . , it has been found sufficient that some aspect of federal law is essential to plaintiff's success. *Smith v. Kansas City Title & T. Co.*, 255 U.S. 180 [(1921)] . . . . The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote.

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[4] The full text of the Texas statute is printed at App. 14a.

Textile Workers v. Lincoln Mills, 353 U.S. 448, 470 (1957) (dissenting opinion).

In *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936), Justice Cardozo noted the "well established" tests for determining when the presence of a federal issue is sufficient to confer federal jurisdiction over a state law claim:

> To bring a case within the statute [28 U.S.C. § 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . , and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

Gully, 299 U.S. at 112-13 (citations omitted).

In *Franchise Tax Board*, the Supreme Court reaffirmed its analysis:

> As an initial proposition, then, the "law that creates the cause of action" is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is "really" one of federal law.
>
> Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Franchise Tax Board, 463 U.S. at 13.

Thus, there is federal jurisdiction over a state law claim where the well-pleaded complaint discloses that the resolution of a federal issue is a "necessary" or "essential" element of the state law claim *and* the federal issue is "substantial."

A. The Resolution of Whether Equal Treaty Rights Exist is a "Necessary" or "Essential" Element of the State Law Claims

A plain reading of the Texas statute reveals that the existence of equal treaty rights is a "necessary" or "essential" element of respondents' claims. The statute specifically states that the action may be "enforced in the courts of [Texas]" *only* "if" the foreign country (*i.e.*, Nicaragua) "has equal treaty rights with the United States on behalf of its citizens." App. 14a.

The Fifth Circuit Court of Appeals declined to squarely address the issue, instead finding that "[a]ny inquiry into whether § 71.031's 'equal treaty rights' requirement confers 'arising under' jurisdiction on district courts is foreclosed by our very recent decision in *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997)."

The Fifth Circuit decided *Torres* after the oral argument in this action. In *Torres*, approximately 700 Peruvian citizens commenced an action in the Texas state court against a mining corporation and others. Defendants removed the action. The district court denied plaintiffs' motion to remand and granted defendants' motion to dismiss on the ground of *forum non conveniens* and comity among nations.

The Court of Appeals held in *Torres* that federal subject matter jurisdiction existed because the "complaint raises substantial questions of federal law by implicating the federal common law of foreign relations." *Torres*, 113 F.3d at 542. However, the *Torres* court, without citing any authority, also held that the resolution of whether there were "equal treaty rights" did not establish federal jurisdiction:

> At the outset we reject [defendant's] contention that Tex. Civ. Prac. & Rem. Code § 71.031 confers federal jurisdiction. That provision allows a citizen of a foreign country to bring in the Texas state courts an action for personal injury or death occurring in a foreign nation if, *inter alia*, the country in which the plaintiff is a citizen "has equal treaty rights with the United States on behalf of its citizens." **The mere fact that section 71.031 requires a Texas state court to examine treaties to determine whether a plaintiff has standing is insufficient by itself to create federal jurisdiction.**

Torres, 113 F.3d at 542 (emphasis supplied).[5]

The Court of Appeals in this action relied entirely on this single sentence from the *Torres* opinion in remanding this case to state court. The *Torres* court, however, provided no analysis of the issue in its one-sentence statement and, as federal jurisdiction was found to exist in *Torres* on another ground (the federal common law of foreign relations), the one sentence in *Torres* regarding "equal treaty rights" was merely dicta.

The Court of Appeals in this action explained its reliance on *Torres* as follows:

> Regardless of how one characterizes the equal treaty rights requirement, once their existence *vel non* is decided, their importance disappears. They are irrelevant to Plaintiffs' substantive right to recover.

App. 7a.

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[5] Prior to *Torres*, the Texas federal district courts were split as to whether there is federal jurisdiction to resolve the equal treaty rights issue. *Compare Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994) and the district court decision below (federal jurisdiction exists) *with Alvarez v. Servicios Aereos de Honduras, S.A.*, No. H-93-3060 (S.D. Tex. Feb. 22, 1995) and *Baker v. Bell Helicopter/Textron Inc.*, 907 F. Supp. 1007 (N.D. Tex. 1995) (federal jurisdiction does not exist).

This reasoning is erroneous, however, because it ignores the fact that "equal treaty rights", by statutory definition, *must* exist between the United States and Nicaragua for respondents to bring suit at all; their existence clearly is an "essential" element of the action. Plaintiffs' "right to relief" under Texas law depends on whether a court finds that "equal treaty rights" exist between the United States and another nation. *See Franchise Tax Board*, 463 U.S. at 13.

The Court of Appeals below then sought to justify its erroneous conclusion that equal treaty rights are not an essential element of the claim:

> A favorable ruling on the equal treaty rights issue does not guarantee the Plaintiff will be successful in holding AVIATECA liable in a Texas forum. Likewise, a dismissal for lack of equal treaty rights does not *per se* prevent Plaintiffs from successfully prosecuting a cause of action against AVIATECA in a different forum.

App. 7a.

The Court of Appeals' reasoning that equal treaty rights are not an "essential" element because respondents could maintain the action in a different forum[6] is erroneous because the federal issue must be an essential element of the cause of action alleged in the well-pleaded complaint[7], not of a hypothetical action that could be brought in another state. *See Smith*, 255 U.S. at 199, 201 (cause of action alleged in the complaint required the Court to resolve a federal constitutional issue as an element of the state law claim); *see also*

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[6] The parties have not identified any state other than Texas which has a wrongful death statute incorporating the "equal treaty rights" requirement. *Compare* Ga. Code Ann. § 1-2-10 (1997) (the Georgia statute permits citizens of other states or countries to sue in Georgia if "the same *comity* is extended in the courts of other states to citizens of this state") (emphasis added).

[7] The Court of Appeals expressly determined that the federal issue was pleaded in the Complaint. App. 6a.

Franchise Tax Board, 463 U.S. at 13 (well-pleaded complaint must establish that the right to relief requires resolution of a substantial question of federal law); *Gully*, 299 U.S. at 112-113; *West 14th Street Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir.), *cert. denied*, 484 U.S. 850 (1987).

Finally, the Court of Appeals concluded:

> In sum, "equal treaty rights" are neither a substantial nor an essential element of Plaintiff's action.

App. 7a.

The statement of the Court of Appeals that equal treaty rights are not "a *substantial* . . . element of Plaintiffs' action" reveals that the court did not apply the correct test. The question is whether the resolution of the equal treaty rights issue is an "essential" element of the plaintiffs' cause of action, not a "substantial" element; it is the *federal issue* which must be "substantial". *See Gully*, 299 U.S. at 112-113.

B. The Resolution of Whether There are Equal Treaty Rights Between the United States and Nicaragua is a "Substantial" Federal Issue

In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986), the Court concluded that it is the nature of the federal interest involved in the state law claim which determines whether the federal issue is "substantial" enough that the claim arises under federal law. There is a substantial federal interest in resolving which treaties will satisfy the equal treaty rights requirement. The resolution of this single issue is determinative of whether a citizen of a foreign country, based solely on the treaties executed by the country of which he or she happens to be a citizen, has the right to sue in Texas for death or injury occurring outside Texas.

The treaty requirement imposed by the Texas statute makes standing to sue wholly contingent on the treaty relationship of the United States with the foreign nation. The substantial federal interest is therefore the consistent and correct interpretation of numerous treaties (*see, e.g., infra* at 14-16, identifying the numerous treaties that respondents argue cumulatively satisfy the requirement) to resolve which countries' citizenries have standing to sue in Texas. *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937) (addressing supremacy of treaties over state laws and policies); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (reviewing and reversing treaty interpretation of state court); *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268, 272 (1909) (although "the construction of a state statute by the highest court of the state must be accepted by this [C]ourt," the Court reviewed the treaty issue because "plaintiff rests her right to recover not upon [the state] statute alone, but upon certain provisions of a treaty between the United States and the King of Italy"); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (issues involving "the relationships [of the United States] with other members of the international community must be treated as an aspect of federal law"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 326 cmt. d, § 112 cmt. a (1987) (interpretation of treaties is a matter of federal law).

As set forth below, the substantial nature of the federal interest raised by the equal treaty rights requirement is illustrated in this case by several factors:

a) because of hostile actions by the former Nicaraguan government, the President of the United States terminated the single treaty between the United States and Nicaragua which could have satisfied the equal treaty rights requirement;

b) confronted with the termination of the treaty, respondents urged the district court that numerous other treaties "cumulatively" established equal treaty rights between the United States and Nicaragua;

c) although the district court below concluded that these treaties did not establish equal treaty rights, the Texas state appellate court recently held that these same treaties do establish equal treaty rights (*see infra* at 16-17), thus creating a conflict between the Texas state and federal courts; and

d) the legislative purpose of the equal treaty rights provision was to ensure that the Texas statute was constitutional by granting citizens of foreign countries the same right enjoyed by Texas citizens to maintain an action for death or injury that occurred outside the state.

1. The Termination of the Treaty Which Could Have Established Equal Treaty Rights Between the United States and Nicaragua

There is no legislative history in Texas to explain which treaties will satisfy the meaning of the "equal treaty rights" requirement.[8] In *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991)[9], however, the Texas Supreme Court found that the Treaty of Friendship, Commerce and Navigation between the United States and Costa Rica satisfied the requirement:

> The United States and Costa Rica agreed to the following: The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries

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[8] *See* Allan R. Stein, *Erie and Court Access*, 100 Yale L.J. 1935 n.3 (1991) (noting the absence of legislative history concerning "equal treaty rights" and citing only to Treaties of Friendship, Commerce and Navigation for the proposition that "[t]he United States does have treaties with numerous countries guaranteeing free access to American courts. . . .").

[9] The *Dow Chemical* case, which temporarily abolished the doctrine of *forum non conveniens* in Texas in personal injury and wrongful death actions, was superseded by statute. *See* Tex. Civ. Prac. & Rem. Code § 71.051 (1997).

> respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all cases, the advocates, attorneys, or agents of whatever description, whom they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens. Treaty of Friendship, Commerce, and Navigation, July 10, 1851, United States-Costa Rica, art. VII, para. 2, 10 Stat. 916, 920, T.S. No. 62. Subsection (a)(3) requires the existence of similar treaty provisions before an action by a citizen of a foreign country may be maintained under Section 71.031.

Dow Chemical, 786 S.W.2d at 675 n.2.

Similar treaty provisions *formerly* existed between the United States and Nicaragua. *See* Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.-Nicaragua, 9 U.S.T. 449. R 272, 270, 252; 550, 548, 530. Article V of the Treaty provided in pertinent part:

> Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

R 272, 266; 550, 544. "National" and "most-favored-nation treatment" are defined in Article XXII as "no less favorable than the treatment accorded" to nationals of the other party. R 272, 253; 550, 531. The Treaty, therefore, granted "equal treaty rights."

Equal treaty rights no longer exist between the United States and Nicaragua because the Treaty of Friendship, Commerce and Navigation that formerly provided "equal treaty rights" was terminated effective May 1, 1986. On May 1, 1985, President Reagan signed Executive Order 12,513 proclaiming the actions of the Nicaraguan Government "an

unusual and extraordinary threat to the national security and foreign policy of the United States . . . ." Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985). R 248. The Order rescinded free trade, transportation and navigation between the countries and gave notice terminating the treaty effective May 1, 1986. *Id.*, R 244-246.

2. Respondents' Misplaced Reliance on Numerous Other Treaties to Attempt to Establish the Existence of Equal Treaty Rights

Confronted with the termination of the only treaty that could have satisfied the equal treaty rights requirement, respondents argued that the "cumulative" effect of numerous other treaties and international multilateral agreements satisfy the equal treaty rights requirement. R 676, 673.

For example, the respondents argued that the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, ["ICCPR"] establishes the existence of "equal treaty rights" between Nicaragua and the United States.[10] R 676, 673-669. The ICCPR, however, does *not* address the right of a foreign national to bring a civil wrongful death or personal injury action in the United States and does *not* contain an access to courts provision which would afford equal treaty rights.[11]

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[10] The ICCPR addresses a "broad spectrum of civil and political rights", "obligates each State Party to respect and ensure these rights" and "establishes a Human Rights Committee to oversee compliance and investigate reports of noncompliance made by one Party against another." SENATE COMM. ON FOREIGN RELATIONS, 102d CONG., 2d SESS., REPORT ON INTERNATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS at 1-2, *reprinted in* 31 I.L.M. 648, 649 (1992). R 764-765.

[11] "Criminal law is a principal area of concern in the Covenant. . . . The Covenant provides certain procedural protections to criminal suspects, the accused, and convicted prisoners, and several provisions pertain to conduct of criminal trials." John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harv. Hum. Rts. J. 59

Moreover, in contrast to the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, which was a self-executing treaty,[12] neither the ICCPR nor the Charter of the Organization of American States ("OAS Charter"),[13] also relied upon by respondents, are self-executing. R 726, 715-714. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808, 818-19 & n.26 (D.C. Cir. 1984) (Bork, J., concurring) (noting that the ICCPR is not self-executing and stating, "[a]bsent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action"), *cert. denied*, 470 U.S. 1003 (1985). *See also In re Alien Children Ed. Litig.*, 501 F. Supp. 544, 590 (S.D. Tex. 1980) (the OAS Charter is not a self-executing treaty), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982).

The non-self-executing status of the treaties and agreements relied upon by respondents reveals that they cannot confer a substantive right of access to courts (even if the agreements contained access to courts provisions, which they do not). Thus, the agreements do not establish the existence of equal treaty rights. Neither did the other agreements relied upon by respondents grant access to courts or relate to a right to maintain a civil wrongful death action.[14]

& n.16 (1993) (explaining that the various provisions in Article 14 of the Covenant pertain to criminal procedure).

[12] *See, e.g., Spiess v. C. Itoh & Co. (America) Inc.*, 643 F.2d 353, 356 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

[13] Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, *as amended by* the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. The OAS Charter (R 676, 640-30) does *not* contain an access to courts provision.

[14] These included the Vienna Convention on Consular Relations, the General Agreements on Tariffs and Trade, the Intellectual Property Convention, and the Agreement on Countervailing Measures. R 715-716, 726.

The district court in this action thus correctly rejected respondents' arguments and dismissed the action for lack of standing:

> Plaintiffs have submitted evidence of other agreements between the two countries, including the Agreement of Friendship and Cooperation signed in 1992 and the International Covenant on Civil and Political Rights. These agreements, however, do not contain an access to courts provision and this court has no basis for finding that its absence is mere oversight. The Court cannot infer "equal treaty rights" where they do not explicitly exist. *See Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2d Cir. 1996). Because construction of the United States agreements submitted by Plaintiffs reveals there are no "equal treaty rights" between the United States and Nicaragua, Plaintiffs have no standing under § 71.031 and Defendant's motion to dismiss for lack of standing must be granted.

App. 11a.

3. There is a Conflict Between the Federal and State Courts as to Which Treaties Will Satisfy the "Equal Treaty Rights" Requirement

Although the district court concluded that the group of treaties relied upon by respondents do *not* cumulatively confer equal treaty rights, the Court of Appeals of Texas recently determined that these *same* treaties do confer equal treaty rights. *See Kazi v. Dubai Petroleum Co.*, No. 01-95-01436-CV, 1997 WL 349869 (Tex. Ct. App. June 26, 1997).

In *Kazi*, the issue was whether there are equal treaty rights between the United States and India. Plaintiffs made the identical argument that was made in the district court below that several treaties collectively provided for equal treaty rights. Among the four treaties on which the *Kazi* plaintiff relied was the International Covenant on Civil and Political Rights (also

relied upon by respondents below). The *Kazi* court, however, accepted plaintiff's argument that the ICCPR established the existence of equal treaty rights despite the express finding of the district court in this action that the ICCPR did not establish the existence of equal treaty rights.

Moreover, the *Kazi* decision is in conflict with the Second Circuit Court of Appeals, which held that the equal access to courts provisions in Treaties of Friendship, Commerce and Navigation cannot be inferred in other treaties where they are not expressly adopted:

> History and practice thus teach that a principle of equal access must be explicitly adopted. In the absence of such an explicit provision in the Berne Convention, we cannot construe a simple declaration of "national treatment" to imply such a principle. . . .

Murray, 81 F.3d at 291.

The conflict between the state and federal courts in the construction and application of these treaties strongly supports federal jurisdiction and the need for this Court to resolve the issue.

4. The Legislative Intent of the "Equal Treaty Rights" Provision was to Ensure That the Texas Statute is Constitutional

The nature of the federal interest invoked by the "equal treaty rights" requirement is also revealed by the legislative purpose for its inclusion in the statute, which was to ensure that citizens of foreign countries (or at least foreign countries which had equal treaty rights) had the same right to sue in Texas as did citizens of Texas for death or injury that occurred elsewhere. The legislative purpose of the predecessors[15] to § 71.031 was to overrule court decisions exclud-

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[15] "The statutory predecessors of Section 71.031 have existed since 1913." *Dow Chemical*, 786 S.W.2d at 675.

ing an action for wrongful death of Texas citizens, if that death or injury occurred in another state or foreign country. *See Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 185 (Tex. 1968); *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710, 712 (Tex. 1968).

The Texas legislature amended the original 1913 statute in 1917, in part to ensure that the statute provided to citizens of foreign countries with equal treaty rights the same cause of action that the 1913 statute had afforded to Texas citizens. *See Dow Chemical*, 786 S.W.2d at 705 n.7 (Hecht, J., dissenting) ("[t]his act was amended in 1917 to apply to citizens of the United States as well as of this State and foreign countries, and to clarify that the actionable injury could occur not only in another state but also in a foreign country").

The 1917 amendments were thus meant to allay legislative concerns that an extraterritorial wrongful death statute, made applicable only to citizens of Texas, might violate the federal Constitution. *See e.g., Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142 (1907) (addressing on bill of error whether Ohio wrongful death statute violated the Privileges and Immunities Clause). Although the equal treaty rights provision may satisfy similar Constitutional equal protection concerns by permitting citizens of foreign countries reciprocal rights to sue in Texas, the Texas legislature's requirement that those rights be granted by treaty has, in turn, created a substantial federal issue that must be resolved each time the statute is invoked.

In summary, a court is required to resolve the issue of whether equal treaty rights exist between the United States and a foreign nation each time an action for damages is commenced under the Texas statute for death or injury of a citizen of a foreign country which occurs outside Texas. The right to maintain such an action is therefore contingent upon the treaty relationship of the United States with the foreign country at issue. A plaintiff's right to relief thus requires resolution of a substantial question of federal law. A uniform

federal standard is needed to ensure the consistent and correct interpretation of the numerous treaties of the United States which may be relied upon to confer equal treaty rights, as demonstrated by the conflicting decisions that have arisen from the issue.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED: JUNE 27, 1997
NO. 96-20591

RAUL PALACIOS ROMAN, *ET AL.*,

Plaintiffs-Appellants.

versus

AVIATECA, S.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(96-CV-142)

Before:

REAVLEY, KING, and BARKSDALE,
Circuit Judges.

PER CURIAM:*

Raul Palacios Roman, *et al.* (Plaintiffs), appeal from the denial of their motion to remand to state court for lack of subject matter jurisdiction and the subsequent dismissal of their action for lack of standing, under TEX. (CIV. PRAC. & REM.) CODE ANN. § 71.031 (West 1986). In the light of our court's very recent decision in *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), the district court did not have jurisdiction. Accordingly, we REVERSE and REMAND with instructions to remand to state court.

I.

AVIATECA, S.A., is a Guatemalan-based international air carrier that operates regularly scheduled flights to cities in the southern United States. In August 1995, one of its flights crashed while en route from Guatemala to El Salvador, killing all 58 passengers and seven crew-members.

Plaintiffs are the personal representatives and next of kin of five of the passengers killed in the crash. In September 1995, less than two months after the crash, they commenced this wrongful death action in Texas state court, alleging "willful misconduct, willful negligence and gross negligence" on the part of AVIATECA in the maintenance and operation of the aircraft. Because the crash did not take place in Texas, and because the five decedents were citizens of a foreign country (Nicaragua), Plaintiffs had to establish, *inter alia*, that "equal treaty rights"[1] exist between the United States and Nicaragua

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] Equal treaty rights between the United States and Nicaragua exist if "treaty provisions" provide that citizens of the United States have " 'free and open access to the courts of justice' " in Nicaragua and that citizens of Nicaragua have those same rights in the United States. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 675 n.2 (Tex. 1990) (quoting Treaty of Friendship, Commerce, and Navigation, July 10, 1851, U.S.-Costa Rica, art. VII, para. 2, 10 Stat. 916, 920).

in order to maintain their action in a Texas state court. TEX. (CIV. PRAC. & REM.) CODE ANN. § 71.031 (West 1986). Plaintiffs so alleged in their original and amended complaints.

In January 1996, AVIATECA removed this action to federal court on the ground that Plaintiffs' claims gave rise to federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(a). AVIATECA contended that, because of § 71.031's requirement of equal treaty rights, Plaintiffs' claims depended on construction of United States treaties. It also asserted that Plaintiffs' claims raised questions of foreign relations that are incorporated into federal common law.

Plaintiffs moved to remand for lack of federal question jurisdiction. *See id.* § 1447(c). Before the court could rule on that motion, AVIATECA moved to dismiss, pursuant to FED. R. CIV. P. 12(b)(6), on the ground that Plaintiffs lacked standing under § 71.031 because they could not show the existence of equal treaty rights between the United States and Nicaragua. It also moved to dismiss on the ground of *forum non conveniens*.

In May 1996, the district court denied Plaintiffs' motion to remand and granted AVIATECA's motion to dismiss for lack of standing, concluding that equal treaty rights do not exist between the United States and Nicaragua. AVIATECA's motion to dismiss for *forum non conveniens* was denied as moot.

II.

Plaintiffs challenge both aspects of the district court's ruling. First, they contend that the district court erred in denying their motion to remand because, they maintain, none of their claims triggered § 1331 federal question jurisdiction. Because we conclude that the district court did not have subject matter jurisdiction, we need not address the other contentions, including whether equal treaty rights exist between the United States and Nicaragua.

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction[ ]

may be removed by the defendant . . . ." 28 U.S.C. § 1441(a). Of course, § 1441 is to be strictly construed, and a defendant who seeks to sustain removal bears the burden of establishing federal subject matter jurisdiction. *See Rivet v. Regions Bank of La., F.S.B.*, 108 F.3d 576, 582 (5th Cir. 1997), *petition for cert. filed* (U.S. June 11, 1997) (No. 96-1971).

No authority need be cited for the rule that federal courts have limited subject matter jurisdiction. The Supreme Court has explained that federal courts "possess only that power authorized by Constitution and statute. . . . It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction. . . ." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1675 (1994) (citations omitted). Although the Constitution authorizes federal courts to hear a variety of cases, U.S. Const. art. III, § 2, in this case we must determine whether Plaintiffs' action falls within the district court's federal question jurisdiction.

Federal courts are empowered to hear "all civil actions arising under the Constitution, laws, or treaties of the United States". 28 U.S.C. § 1331. Along this line, the Court has held that "laws" includes federal common law as well as federal statutory law. *See Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972). Determining when a case or controversy "arises under" federal law, however, is not an easy task. As the Supreme Court has noted, "[T]he statutory phrase . . . has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts." *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8 (1983). For purposes of this opinion, "federal law(s)" refers collectively to all the possible bases for § 1331 jurisdiction.

A straightforward and frequently cited definition of "arising under" is Justice Holmes' statement: "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). In

addition, the Court has held that a case may arise under federal law where "the vindication of a right under state law necessarily turn[s] on some construction of federal law". *Franchise Tax Bd.*, 463 U.S. at 9; *see also Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-14 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 200-01 (1921).

This latter category of cases presents what has been called the "litigation-provoking problem", *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting)—the "presence of a federal issue in a state-created cause of action". *Merrell Dow*, 478 U.S. at 809-10. To invoke federal jurisdiction in this manner, a "right or immunity created by the Constitution or laws of the United States" must be an "essential" element of the plaintiff's cause of action. *Gully*, 299 U.S. at 112; *see also Franchise Tax Bd.*, 463 U.S. at 13. The federal element must be both "substantial" and "disputed", *Franchise Tax Bd.*, 463 U.S. at 13; and it must be disclosed on the face of the complaint. *Id.* at 9-12; *Gully*, 299 U.S. at 113.

For the case at hand, federal law, including any treaty of the United States, does not create the cause of action. In their complaint, Plaintiffs specifically disavow any reliance on federal law or federal remedies. In addition, this case is not governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), because Nicaragua has not signed or ratified it. AVIATECA does not dispute this conclusion.

Therefore, this case may "arise under" federal law only if there is a substantial question of federal law on which Plaintiffs' right to recover in their wrongful death action necessarily turns. AVIATECA contends that the determination of whether equal treaty rights exist between the United States and Nicaragua is such a federal question because construction of treaties is required. It maintains also that Plaintiffs' claims implicate the foreign relations of the United States, a matter that is controlled by federal common law.

A.

First, however, we dispense with Plaintiffs' contention that the well-pleaded complaint rule forecloses federal question jurisdiction. Under that rule, whether a case "arises under" federal law

> must be determined from what necessarily appears in the plaintiff's statement of his own claim in the [complaint] unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

See Franchise Tax Bd., 463 U.S. at 9-10 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). Plaintiffs' contend that no federal question appears on the face of their complaint because they specifically disavow reliance on federal law or federal remedies.

However, Plaintiffs originally maintained their action in Texas state court under § 71.031 and, as such, alleged the existence of equal treaty rights. In other words, they specifically invoked that federal issue in their complaint. That issue may not be "essential" or "substantial" enough to make this action arise under federal law, but it does foreclose any attempt to remand under the well-pleaded complaint rule. This result, we note, is entirely consistent with both the rule and the cases interpreting § 1331. *See Franchise Tax Bd.*, 463 U.S. at 14 (finding federal issue to be "clear on the face of [the] well-pleaded complaint" but finding no § 1331 jurisdiction).

B.

Any inquiry into whether § 71.031's "equal treaty rights" requirement confers "arising under" jurisdiction on district courts is foreclosed by our very recent decision in Torres v. *Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997). In *Torres*, approximately 700 Peruvian citizens, pursuant to

§ 71.031, brought an action against a mining corporation and others in Texas state court, claiming state law causes of action. *Id.* at 541. Defendants removed on several grounds. One removal-basis was that § 71.031 triggered federal question jurisdiction, *id.* at 541-42; but, our court rejected this contention out of hand: "The mere fact that § 71.031 requires a Texas state court to examine treaties to determine whether a plaintiff has standing is insufficient by itself to create federal jurisdiction." *Id.* at 542.

Of course, we are bound by *Torres*. Regardless of how one characterizes the equal treaty rights requirement, once their existence *vel non* is decided, their importance disappears. They are irrelevant to Plaintiffs' substantive right to recover. A favorable ruling on the equal treaty rights issue does not guarantee that Plaintiffs will be successful in holding AVIATECA liable in a Texas forum. Likewise, a dismissal for lack of equal treaty rights does not *per se* prevent Plaintiffs from successfully prosecuting a cause of action against AVIATECA in a different forum.

In sum, "equal treaty rights" are neither a substantial nor an essential element of Plaintiffs' action. As held in *Torres*, removal on that basis was improper.

C.

In the alternative, citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), AVIATECA contends that removal was proper because claims in this case implicate the foreign relations of the United States, a matter that is controlled by federal common law. As noted in *Torres*, "the Supreme Court has authorized the creation of federal common law in the area of foreign relations." *Torres*, 113 F.3d at 542 n.7 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)).

Torres concluded that the plaintiffs' claims in that case did implicate important foreign policy concerns such that federal question jurisdiction existed; the defendant mining corpora-

tion was critical to the Peruvian economy and the Peruvian government had participated "substantially" in the actions for which that corporation was being sued. *Id.* at 543. The action therefore "str[uck] at vital economic interests [and] at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged". *Id.*

The facts of this case, however, are markedly different. There is no evidence that AVIATECA, a Guatemalan corporation, is "critical" to that country's economy (if that were enough). In addition, there is no evidence that the government of Guatemala (or any other country) is involved in the activities for which AVIATECA, a privately owned corporation, is being sued. Plaintiffs' action, therefore, does not strike at vital economic or sovereign interests of any nation. *See Marathon Oil Co. v. Ruhrgas, A.G.*, No. 96-20361, 1997 WL 31091, at *3-4 (5th Cir. June 10, 1997) (refusing to find federal question jurisdiction based on *Torres* because vital economic and sovereign interests of foreign nation not implicated).

Nor does *Sabbatino* support AVIATECA'S contention. That case involved an action by an instrumentality of the Cuban government against an American commodities broker for conversion of a sugar shipment. *Id.* at 401-06. Cuba claimed title to the sugar by virtue of a law giving the Cuban President power to nationalize certain property by forced expropriation. *Id.* at 401. At issue was whether the act of state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts [that] a recognized foreign sovereign power [has] committed within its own territory", prohibited challenging Cuba's title, which would necessarily question the validity of an act of the Cuban government. *Id.* at 401. In discussing the nature of that doctrine, the Court stated:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the

> international community must be treated exclusively as an aspect of federal law. . . .

Id. at 425.

Taking this language in context, we read *Sabbatino* to mean that cases substantially implicating the foreign relations of the United States, such as those cases involving the act of state doctrine, are controlled by federal common law. This case does not implicate foreign relations, nor does it involve the act of state doctrine. The determination of whether the courts of the United States are open to citizens of Nicaragua and *vice-versa* does not touch upon the "competence" of the Executive Branch to "order[ ] our relationships" with Nicaragua, nor does it call into question the validity of any act of the government of Nicaragua or any other country. Plaintiffs' claims simply do not implicate this enclave of federal common law. Therefore, AVIATECA could not remove Plaintiffs' action on that basis.

III.

For the aforementioned reasons, we REVERSE the judgment of the district court and REMAND with instructions to remand to state court.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-142
Filed: MAY 22, 1996

RAUL PALACIOS ROMAN, *et al.*,

Plaintiffs,

—VS.—

AVIATECA, S.A.,

Defendant.

ORDER

This case arises out of the crash of a Guatemalan aircraft in El Salvador in August 1995. Plaintiffs are citizens and residents of Nicaragua. The case is now before the Court on Plaintiffs' Motion to Remand and Defendant's Motions to Dismiss which have been fully briefed and are ripe for decision.

Plaintiffs assert this Court is without subject matter jurisdiction and Defendant responds there is federal question jurisdiction based on questions of foreign relations and the treaties of the United States. Specifically, Texas Civil Practice and Remedies Code § 71.031 permits a citizen of a foreign country to maintain an action in Texas if the foreign country has "equal treaty rights" with the United States. Determination of whether Plaintiffs have standing to proceed under § 71.031

requires consideration of treaties between the United States and the foreign county and, therefore, provides a basis for federal question jurisdiction. *See Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525 (S.D. Tex. 1994). As a result, Plaintiffs' motion to remand must be denied.

The Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua which previously provided "equal treaty rights" was terminated effective May 1, 1986 by Executive Order 12513. Plaintiffs have submitted evidence of other agreements between the two countries, including the Agreement of Friendship and Cooperation signed in 1992 and the International Covenant on Civil and Political Rights. These agreements, however, do not contain an access to courts provision and this Court has no basis for finding that its absence is mere oversight. The Court cannot infer "equal treaty rights" where they do not explicitly exist. *See Murray v. British Broadcasting Corp.*, 81 F.3d 287 (2d Cir. 1996). Because construction of the United States agreements submitted by Plaintiffs reveals there are no "equal treaty rights" between the United States and Nicaragua, Plaintiffs have no standing under § 71.031 and Defendant's motion to dismiss for lack of standing must be granted.

An appropriate final order consistent herewith shall be issued this day.

SIGNED this 22nd day of May, 1996, at Houston, Texas.

NORMAN W. BLACK

NORMAN W. BLACK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-142
Filed: May 22, 1996

RAUL PALACIOS ROMAN, *et al.*,

Plaintiffs,

—VS.—

AVIATECA, S.A.,

Defendant.

FINAL ORDER

In accordance with the Court's order issued this day, it is hereby

ORDERED that Plaintiffs' Motion to Remand (Entry #6) is DENIED and Defendant's Motion to Dismiss for Lack of Standing (Entry #7) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss for Forum Non Conveniens (Entry #9) and Plaintiffs' motion for additional time for discovery on the forum non conveniens issue and to delay ruling on that issue until after the Court rules on the Motion to Remand (Entry #22-1 and #22-2) are DENIED AS MOOT.

THIS IS A FINAL ORDER.

SIGNED this 22nd day of May, 1996, at Houston Texas.

NORMAN W. BLACK

NORMAN W. BLACK
CHIEF JUDGE

Texas Statute

§ 71.031. Act or Omission out of State

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

The Texas Legislature recently amended Tex. Civ. Prac. & Rem. Code § 71.031 by adding the language highlighted below:

Sec. 71.031. . . .

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action;

(3) for a resident of a foreign state or country, the action is begun in this state within the time provided by the laws of the foreign state or country in which the wrongful act, neglect, or default took place; and

(4) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) **Except as provided by Subsection (a), all** matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

Act of May 29, 1997, ch. 424, § 3, 1997 Tex. Sess. Law. Serv. 2984, 2990-91 (West).

Thus, the Act does not substantively alter the equal treaty rights requirement; in adding a statute of limitations provi-

sion, the Act moves the equal treaty rights provision from subsection (a)(3) to subsection (a)(4).

The Act amending § 71.031 provides that the amendment applies only to civil actions commenced on or after the effective date of the Act, May 29, 1997; a "civil action commenced before the effective date of this Act is governed by the applicable law in effect immediately before that date as to all parties joined in that action on or before that date . . . and that law is continued in effect for that purpose." *Id.*, § 4(c), 1997 Tex. Sess. Law. Serv. at 2991.

This change, therefore, does not affect the version of § 71.031 applicable to this matter or the numbering of the subsections; nor do the amendments clarify or change the equal treaty rights requirement of § 71.031. Therefore, AVIATECA cites in this petition to the version of § 71.031 applicable to this action.